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| Scott v Metrostar Cab Corp. |
| 2017 NY Slip Op 31016(U) |
| May 12, 2017 |
| Supreme Court, New York County |
| Docket Number: 156521/2014 |
| Judge: Paul A. Goetz |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

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SUZANNE SCOTT,

Plaintiff(s),

-against-

METROSTAR CAB CORP., WJL EQUITIES
CORP. and OSMAN GANI,

Defendant(s).

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Index No.: 156521/2014

Motion Sequence No.: 1

DECISION and ORDER

Recitation, as required by CPLR § 2219(a), the following papers were considered on the motion(s):

| <u>Papers</u> | <u>Numbered</u> |
|---------------------------------------------------------------------------------------------------------------------|-----------------|
| Defendants, Metrostar Cab Corp. & Osman Gani's Notice of Motion for summary judgment and affirmation with exhibits | 1 |
| Defendant, WJL Equities Corp.'s Notice of Cross-Motion for summary judgment, affidavit and affirmation with exhibit | 2 |
| Plaintiff's opposition affirmation with exhibits | 3 |
| Defendants, Metrostar Cab Corp. & Osman Gani's reply affirmation | 4 |

PAUL A. GOETZ, J.

Plaintiff, Suzanne Scott, initiated this action against Defendants, Metrostar Cab Corp., WJL Equities Corp. And Osman Gani, alleging serious injuries as defined by Insurance Law Section 5102(d) resulting from Defendants' negligent ownership and/or operation of a motor vehicle on September 14, 2013¹. Defendants now move for summary judgment pursuant to CPLR Section 3212 on the grounds that the injuries allegedly sustained by Plaintiff fail to establish the serious injury threshold as defined by Insurance Law Section 5102 (d) and therefore, Plaintiff's claims for non-economic losses are barred by Insurance Law Section 5104 (a).

¹Plaintiff's complaint alleges that on or about September 14, 2013, at Park Avenue and East 31st Street, New York, New York, a 2011, Ford taxi motor vehicle owned by Defendant, Metrostar Cab Corp. and operated by Defendant, Osman Gani collided with Plaintiff's 2001, BMW causing her to sustain serious injuries.

PARTIES' CONTENTIONS

PLAINTIFF'S BILL OF PARTICULARS

Plaintiff alleges in her bill of particulars that she suffers from among other things as a result of the collision on September 14, 2013; "cervical radiculitis secondary to disc herniations; thoracic dextroscoliosis and straightening of the lower thoracic kyphosis; left-sided posterior disc bulging at T7-T8 and T8-T9; right-sided posterior disc bulging at L1-L2 and L2-L3; posterior disc bulges at C4-C5, C5-C6 and C6-C7; no acute thoracic injury; cervical derangement with C4-C5, C5-C6, and C6-C7 disc bulges; hypertrophic changes identified at C5-C6."

Plaintiff avers that these injuries meet the following Insurance Law Section 5102 (d) criteria "disc herniation²; an injury or impairment which prevented plaintiff from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than ninety (90) days during the one hundred and eighty (180) days immediately following the occurrence of the injury or impairment."³

DEFENDANTS' SUBMISSIONS⁴

Neurologist, Dr. Weiland

In support of their motion, Defendants Metrostar Cab Corp. and Osman Gani annex the sworn affirmations of a neurologist, Dr. Edward M. Weiland, who performed an independent medical examination of Plaintiff on October 20, 2015. Using a goniometer, Dr. Weiland performed range of motion tests on Plaintiff's cervical spine, lumbar spine and thoracic spine.

Dr. Weiland's range of motion examination of Plaintiff's "cervical spine revealed flexion is to 50 degrees (normal 50 degrees), extension is to 60 degrees (normal 60 degrees), right and left lateral rotation is to 80 degrees (normal 80 degrees), and right and left lateral flexion is to 45 degrees (normal 45 degrees)." Dr. Weiland found

²Disc herniation is not one of the nine categories of serious injury set out in Insurance Law Section 5102(d).

³Since Plaintiff's papers in opposition to the motion and cross-motion address permanent consequential limitation and significant limitation of use categories, and Defendants' reply papers do not object that these categories were not raised in Plaintiff's bill of particulars, the Court will address these two additional categories.

⁴Defendant, WJL Equities Corp.'s cross motion adopts and incorporates the arguments and exhibits submitted by moving Defendants, Metrostar Cab Corp. and Osman Gani as their own.

Plaintiff's range of motion of her lumbar spine and thoracic spine also within normal limits. Dr. Weiland's impressions are that, among other things, Plaintiff's cervical sprain/strain is resolved and that her neurological examination was normal. Dr. Weiland concludes that there is "no evidence of any lateralizing neurological deficits at the present time." He finds no primary neurologic disability at the present time and sees no reason why from a neurological perspective Plaintiff should not be able to perform activities of daily living and continue gainful employment activities, without restrictions.

Radiologist, Dr. Decker

Dr. Mark Decker reviewed an MRI of Plaintiff's cervical spine dated September 26, 2013. Dr. Decker found "[r]eversal of lordosis with grade 1 anterior spondylolisthesis of C3 on C4. No fracture. Diffuse multilevel degenerative disc disease with bulging and spondylotic ridging flattening the thecal sac, most noted at C5-C6. Multilevel Luschka hypertrophy. These findings are all degenerative, longstanding, and not causally related to the date of accident of 09/14/2013." Dr. Decker further found "[f]ocal high signal within the cord at the mid odontoid and C4-C5 level with no cord atrophy or enlargement. Differential could include myelomalacia or dysmyelinating disease. This finding is again longstanding and not causally related to the date of accident of 09/14/2013."

Dr. Decker also reviewed an MRI of Plaintiff's lumbar spine dated September 26, 2013. Dr. Decker concludes that there is "[n]o evidence to suggest that an acute traumatic injury was sustained. No herniation or fracture. Bulging and facet hypertrophy at the lower lumbar levels. These findings are degenerative, longstanding, and not causally related to the date of accident of 09/14/2013."

Finally, Dr. Decker reviewed an MRI of Plaintiff's right shoulder dated September 29, 2013. He concluded, among other things, that "[n]o evidence to suggest that a traumatic injury was sustained. No tear or fracture."

Orthopedist, Dr. Rubinshteyn

Defendants also submit an independent orthopedic examination of Plaintiff performed by Dr. Igor Rubinshteyn, on October 28, 2013. After performing range of motion and other tests on Plaintiff's cervical spine, thoracic spine, lumbar spine, right and left shoulders, and right and left knees, Dr. Rubinshteyn diagnosed Plaintiff with resolved: cervical spine sprain; thoracic spine sprain; lumbar spine sprain; and right shoulder sprain. Dr. Rubinshteyn notes that Plaintiff's subjective complaints are not correlated by objective findings and there is no objective evidence to indicate the need for further medical treatment.

PLAINTIFF'S OPPOSITION

Plaintiff's Neurologist, Dr. Hausknecht

Plaintiff submits a report dated October 18, 2016, by her treating neurologist who first saw her on October 3, 2013, Dr. Aric Hausknecht. After her initial visit with Dr. Hausknecht, Plaintiff had 15 follow-up visits. Dr. Hausknecht performed range of motion and other tests on Plaintiff's cervical spine and thoracic spine. He notes disc bulges he observed on MRI's of Plaintiff's cervical spine, thoracic spine and lumbar spine. Dr. Hausknecht discusses reports by other doctors, Dr. Demarco and Dr. Schottenstein.

Dr. Hausknecht's range of motion examination of Plaintiff's cervical spine revealed: L. Lateral flexion 0-30, normal 0-50; R lateral flexion 0-30, normal 0-50; L rotation 0-60, normal 0-80; R rotation 0-65, normal 0-80; Forward flexion 0-60, normal 0-60; Extension 0-40, normal 0-60.

Dr. Hausknecht's range of motion examination of Plaintiff's thoracic/lumbar spine revealed: Forward flexion 0-80, normal 0-90; Extension 0-20, normal 0-25; L lateral flexion 0-25, normal 0-25; R lateral flexion 0-25, normal 0-25; L rotation 0-30, normal 0-30; R rotation 0-30, normal 0-30.

Dr. Hausknecht states the following impressions in his report: "cervical derangement with C3-4 through C6-7 disc herniation with associated spinal cord impingement. Myofascial pain syndrome. Aggravation of previously asymptomatic underlying degenerative joint disease."

Dr. Hausknecht observes that Plaintiff "received treatment for thoracic and lumbar injuries but at this point in time she has made a satisfactory recovery. Her right shoulder injury is beyond the scope of treatment in this office." Dr. Hausknecht further observes "[t]here is objective evidence of cervical impairment including clinically significant restriction of mobility and positive Spurling maneuver. The MR imaging reveals disc pathology at multiple levels with associated neural impingement." Dr. Hausknecht concludes that "[w]ith a reasonable degree of medical certainty, Ms. Scott has sustained permanent consequential limitation of use of her cervical spine [and she has] sustained a significant limitation of function of her neurologic and musculoskeletal system."

Pain Management/Neurologist, Dr. Schottenstein

Plaintiff also submits a report dated January 3, 2014, by her pain management doctor, Douglas Schottenstein. Dr. Schottenstein performed range of motion testing on Plaintiff's cervical, and thoracic/lumbar spine and observed some limitation in her range of motion tests as compared to normal. Dr. Schottenstein's report notes that Plaintiff's MRI, EMG and x-rays reveal disc bulges and other issues but he does not indicate

when these tests were done. Dr. Schottenstein diagnosis Plaintiff with “[c]ervical radiculitis secondary to disc herniations as seen on MRI.” He concludes that Plaintiff “is totally disabled for current job.”

Plaintiff's Deposition Testimony and Affidavit

At her deposition Plaintiff testified that “[p]rior to the accident of September 13, 2013, I enjoyed a life of work and activities that I can no longer participate in at the same level or at all as a result of the injuries I sustained in the accident.” Plaintiff's affidavit adds details to this statement wherein she alleges that since the accident she cannot work full time because she is unable to sit at a computer for long periods without having pain in her right arm, shoulder and upper back. Plaintiff states in her affidavit she enjoyed painting and was a budding gemological student but is no longer able to hold a paint brush without experiencing cramping, tension and pain in her right shoulder and is unable to sit at microscope for long periods. Plaintiff further claims in her affidavit her husband has taken over cleaning their home because she is unable to perform household chores without experiencing pain and that because her neck movements are restricted she has stopped driving “for the most part.”

ANALYSIS

Serious Injury

“To recover damages for noneconomic loss related to personal injury allegedly sustained in a motor vehicle accident, the plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of Insurance Law § 5102 (d), but also that the injury was causally related to the accident.”

(*Valentin v Pomilla*, 59 AD3d 184, 186 [1st Dept 2009] [internal quotation marks and citation omitted]).

In pertinent part, a “serious injury” has been defined as permanent loss of use of a body organ, a significant limitation of use of a body function, or an “impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment” (Insurance Law § 5102 [d]).

Summary Judgment

“To prevail on a motion for summary judgment, the defendant has the initial

burden to present competent evidence showing that the plaintiff has not suffered a serious injury” (*Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011] [internal quotation marks and citations omitted]). Where there is objective proof of injury, the defendant may meet his or her burden upon the submission of expert affidavits indicating that the plaintiff’s injury was caused by a pre existing condition and not the accident [*Farrington v Go On Time Car Serv.*, 76 AD3d 818, 818 [1st Dept 2010)].

Once defendant meets its initial burden, plaintiff must then demonstrate a triable issue of fact as to whether s/he sustained a serious injury within the meaning of Insurance Law § 5102 [d] (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003]). A plaintiff’s expert may provide a qualitative assessment that has an objective basis and compares plaintiff’s limitations with normal function in the context of the limb or body system’s use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff’s loss of range of motion (*See Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). Further, where defendant has alleged that the injuries are due to a preexisting degenerative condition, plaintiff has “the burden of coming forward with evidence addressing the defendant[’s] claimed lack of causation” (*Valentin v Pomilla*, 59 AD3d at 186).

Permanent Consequential and Significant Limitation of Use

Defendants established prima facie that Plaintiff did not sustain a serious injury under the permanent consequential and significant limitation of use categories by submitting the affirmed reports of Dr. Weiland, Dr. Rubinshteyn and Dr. Decker.⁵

Dr. Weiland’s range of motion examination revealed normal range of motion for Plaintiff’s cervical, lumbar and thoracic spines, allowed that Plaintiff’s cervical sprain/strain is resolved and found no neurologic disability. Dr. Rubinshteyn’s range of motion examination also revealed normal range of motion for Plaintiff’s cervical, lumbar and thoracic spines as well as for both of Plaintiff’s shoulders and knees. Likewise, Dr. Rubinshteyn diagnosed Plaintiff with resolved sprains of the cervical, thoracic and lumbar spines and of the right shoulder. The Court notes that Dr. Weiland and Dr. Rubinshteyn “properly provided objective bases for [their] conclusions that plaintiff[’s] ranges of motion were normal . . . [by listing] the tests [they] performed and recorded ranges of motion expressed in numerical degrees and the corresponding normal values” (*Spencer*, 82 AD3d at 591).

Dr. Decker reviewed MRI’s of Plaintiff’s cervical and lumbar spines. He opines that Plaintiff’s cervical and lumbar spines show degenerative conditions not causally

⁵ Contrary to Plaintiff’s contention, Dr. Decker and Dr. Rubinshteyn’s affirmations are properly affirmed “under the penalties of perjury” (CPLR § 2106; *Vishevnik v Bouna*, 147 AD3d 657 [1st Dept Feb. 23, 2017]).

related to the September 14, 2013, accident. (*Cattouse v Smith*, 146 AD3d 670 [1st Dept Jan. 26, 2017] [holding the defendant established prima facie that the plaintiffs did not sustain serious injuries by submitting, inter alia, a radiologist's report concluding that plaintiffs showed preexisting degenerative conditions not causally related to the accident]). Defendants did not submit a report from Dr. Decker addressing Plaintiff's thoracic spine.

However, Plaintiff's thoracic injuries as well as her lumbar injures are no longer at issue because according to Plaintiff's Dr. Hausknecht, who agrees in part with Dr. Rubinshteyn, Plaintiff's thoracic and lumbar injuries are resolved. The disagreement among the doctors is whether Plaintiff suffers from cervical spine injuries causally related to the September 14, 2013, accident.

Plaintiff has failed to raise an issue of fact as to whether she suffered a permanent consequential limitation of use or a permanent consequential limitation of use of her cervical spine. While Dr. Hausknecht finds there is objective evidence that Plaintiff has a cervical impairment (restricted mobility and positive Spurling maneuver), he does not address why the impairment is not the result of degenerative conditions not causally related to the accident as found by Dr. Decker. Indeed, Dr. Hausknecht provides no objective basis to support his finding that Plaintiff sustained a permanent consequential limitation of use of her cervical spine and a significant limitation of function of neurologic and musculoskeletal system (*Accord Cattouse*, 146 AD3d at 671 [holding plaintiffs failed to raise an issue of fact because their doctor did not explain why joint disease could not be ruled out as a cause of the plaintiffs' injuries and plaintiffs' doctor failed to provide an objective basis to support a finding of aggravation]). Moreover, because Plaintiff's doctors fail to rule out degenerative changes as the cause for Plaintiff's cervical spine injuries, their opinions that Plaintiff's injuries were caused by the accident are speculative (*Arroyo v Morris*, 85 AD3d 679 [1st Dept 2011] [finding plaintiff's doctors' failure to rule out degenerative conditions raised by defendant's doctor, renders plaintiff's doctors' opinions that the plaintiff's injuries were caused by the accident, speculative]; *Ortiz v Ash Leasing, Inc.*, 63 AD3d 556 [1st Dept 2009] [same]; *Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009] [same]).

Therefore, Plaintiff's opposition fails to raise a triable issue of fact by providing objective medical evidence ruling out degenerative conditions as the cause of Plaintiff's cervical spine injuries (*Id.*).

90/180

The absence of a causal connection between the accident and Plaintiff's injuries requires dismissal of Plaintiff's 90/180-day claim. (*Nakamura v Montalvo*, 137 AD3d 695 [1st Dept 2016] [holding inter alia that absence of evidence of a causal connection between the accident and the plaintiff's injuries requires dismissal of plaintiff's 90/180-day claim]).

Moreover, while Plaintiff testified she can no longer participate in life/work activities at the same level or at all as result of injuries, to the extent that this conclusory, unsubstantiated statement is of any probative value, it does not establish that she was unable to perform her usual activities to a great extent (*Thompson v Abbasi*, 15 AD3d 95 [1st Dept 2005] [observing “substantially all’ should be construed to mean that the person has been prevented from performing his usual activities to a “great extent”]). Plaintiff’s affidavit prepared in opposition to Defendants’ summary judgment motion was “clearly tailored” to address the deficiencies in her deposition testimony and therefore, is “insufficient to raise an issue of fact” (*Id.* at 101) and in any event her claimed limitations were not “substantially all” of her usual and customary daily activities (*Reyes v Park*, 127 AD3d 459 [1st Dept 2015] [holding in part that plaintiff’s claimed limitations, such as his inability to clean his house or play dominoes, does not constitute “substantially all” of his customary daily activities]). In addition, Plaintiff did not present evidence that she was directed by any of her doctors to restrict her activities (*Id.*) and did not submit documentation or an affidavit from her employer substantiating that her work activities have been reduced since the accident (*Dembele v Cambisaca*, 59 AD3d 352 [1st Dept 2009] [holding ‘[w]ithout any substantiating documentation or affidavit from the employer, plaintiff’s vague and self-serving deposition testimony, that he did not return to work until ‘three or four months’ after the accident, does not suffice to show a ‘serious injury’ for purposes of the 90/180 day rule”]).

Therefore, because Defendants have established the absence of a causal connection between the accident and Plaintiff’s injuries and Plaintiff has failed to rebut this showing and because Plaintiff has failed to make a showing that “substantially all” of her customary daily activities were hindered as a result of her injuries, that she was directed by a physician to restrict her activities, and because she failed to substantiate her claim that her work activities have been reduced, Plaintiff’s 90/180-day claim must be dismissed.

Accordingly, Defendants’ motion for summary judgment is granted.

Based upon the foregoing, it is hereby

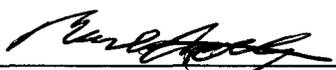
ORDERED that Defendants’ motion for summary judgment is GRANTED in its entirety; and it is further

ORDERED that Plaintiff’s complaint is dismissed with prejudice.

This constitutes the Decision and Order of this Court.

Dated: May 12, 2017

ENTER:


HON. PAUL A. GOETZ, J.S.C.